

Supreme Court, U.S.
FILED

05-481 JUN 8 - 2005

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2005

NUMBER _____

RICHARD A. SHERLOCK

Petitioner

VS.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Richard A. Sherlock
6409 Gillen Street
Metairie, Louisiana 70003
(504) 887-2961

QUESTIONS PRESENTED

I.

THE DECISIONS BELOW ARE IN CONFLICT WITH THE FIFTH CIRCUIT'S OWN RULES AND PRIOR OPINIONS.

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II.

THE DECISIONS BELOW ARE AT VARIANCE WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS; CONSTITUTE A DENIAL OF DUE PROCESS AND EQUAL PROTECTION; AND ARE INCONSISTENT WITH THE PRIOR RULINGS OF THIS SUPREME COURT.

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CASES CITED	PAGE
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<u>Jureczki v. City of Seabrook</u> , 668 F.2d 851 (5th Cir. 02/26/1982) -	9
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CONSTITUTION FOR THE UNITED STATES OF AMERICA

Article 14, Section 1 of the Amendments to the Constitution for the United States of America. -	4
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RULES

5 th Cir. R. 42.3.1.2 -	PASSIM
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OPINIONS AND ORDERS ISSUED IN THIS CASE

The case and opinion below is unreported. The Opinions and Orders issued in this case number three. The first is a clerical dismissal of the appeal to the fifth Circuit Court of Appeals on 9 November 05. The second is an Order issued by the Panel below and is dated 6 January 05. The third is an Order denying Motion for Rehearing of the prior opinion and is dated 10 March 05. While these Order are appropriately discussed below, an exact reproduction of the opinion and/or order in full is included in the Appendix at the end of the Petition for Certiorari.

PETITION FOR WRIT OF CERTIORARI

Petitioner Richard A. Sherlock respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming a clerical grant of a procedural dismissal of Petitioner's Appeal from the District Court as to Orders supporting the District Court's Order for Sale of Petitioner's residential real property.

OPINIONS BELOW

Petitioner Richard A. Sherlock seeks this court's review of orders denying his objections to a procedural dismissal of his appeal before the Fifth Circuit.

The Fifth Circuit Court of Appeals has issued two Orders denying both of Petitioner's Motions: 1) Motion for Rehearing, Fifth Circuit Order denying relief, dated 6 January 05, together with Petitioner's subsequent 2) Motion for Reconsideration, Fifth Circuit Order denying relief, dated 10 March 05. Previously, the clerk's procedural dismissal without notice to Petitioner in express contravention Local

Rules of the Fifth Circuit in this case was entered on 9 November 04. This case before the Fifth Circuit Court of Appeals is unreported.

JURISDICTION

The Fifth Circuit entered its last Order in this case on 10 March 05. This post Judgment/Opinion Petition for Certiorari is timely filed and this Supreme Court has jurisdiction under 28 U.S.C. Section 1254(1), et seq.

Pursuant to Supreme Court Rule 14(1)(e)(v), notification has been made and is duly noted on a separate Certificate of Service tendered to the Clerk contemporaneous with the filing of the Petition for Certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves that portion of Section 1 of the fourteenth article of amendments to the Constitution for the United States of America respecting due process and equal protection of the laws of the United States.

Article 14, Section 1 of the Amendments to the Constitution for the United States of America states in pertinent part as follows:

“...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

FIFTH CIRCUIT RULES INVOLVED

The particular Rule of the Fifth Circuit Court of Appeals involved in this *pro se* case is set out in pertinent part as follows:

5th Cir. R. 42.3.1.2 states in pertinent part as follows:

"42.3.1.2 Appeals without Counsel. The clerk must issue a notice to appellant that 15 days from the date of the notice the appeal will be dismissed for want of prosecution, unless the default is remedied before that date. If the default is remedied within that time, the clerk must not dismiss the appeal."

STATEMENT OF THE CASE

This Petition for Writ of Certiorari filed by Richard A. Sherlock (Sherlock) is made necessary due to a denial of Sherlock, proceeding pro se, to have his case reviewed by the Fifth Circuit on its merits as distinguished from the procedural dismissal pursuant to the Clerk's Letter Order by which this case was disposed. App. A. This procedural dismissal was carried out by the Clerk of the Fifth Circuit without the requisite letter notice of intent to dismiss as is expressly set out in the Fifth Circuit Rules. Sherlock never received the type of notice as expressly required by the rule. Contrary to the rule, Sherlock did receive a notice which failed to comply with the notice requirements of the rule. Accordingly, Sherlock was denied the required due process and equal protection of receiving the required notice of an intent to dismiss the appeal. Absent the required notice as set out in the rule, the Clerk did not have jurisdiction or discretion to dismiss pursuant to the rule. Dismissal deprived Sherlock of his right to have his appeal reviewed by the Fifth Circuit Panel on its merits. Subsequently, Orders issued denying Sherlock's Motion to Reinstate and for Rehearing. App. B and C.

1. Appeal to Fifth Circuit Was Filed and Docketed Timely

The appellate case below was timely and properly appealed from the United States District Court for the Eastern District of Louisiana at New Orleans, Louisiana, in cause number 94-1867-K5. Subsequently, this case was docketed by the Clerk of the Fifth Circuit Court of Appeals (Fifth Circuit) and assigned the number 04-30163. Both cases are unreported. See Docket Sheet, App. D.

2. Letter from Clerk's Office Giving Notice of Deficiency Failed to Give Notice of an Intent to Dismiss.

After receiving a letter notice of a deficiency as to Record Excerpts via Fifth Circuit Clerk's letter dated 13 October 04, (App. I) the deficiency noticed in the letter was cured. Sherlock's curative Record Excerpts were tendered to the clerk for filing on the morning of 9 November 04.

The Clerk's letter to Sherlock dated 13 October 05, failed to give proper notice of an intent to dismiss contrary to the express requirements of the underlying 5th Cir. Rule 42.3.1.2, *infra*, respecting any intent to dismiss the case absent the curative Record Excerpts being filed. App. I

However, Sherlock's filing of Record Excerpts was subsequently made on 9 November 04 without any knowledge at that time by Sherlock of the then - apparently - Clerk's intended letter Order of Dismissal mailed to Sherlock later on the same day - - 9 November 04. Significantly, in light of the later actual dismissal by the clerk, the Clerk's letter notice to Sherlock as to the Record Excerpts deficiency needing to be cured, dated 13 October 04, failed utterly to contain the required notice of any intent to dismiss if the noticed deficiency was not cured. App. I, App. D.

Since the clerk failed to give the expressly required notice as is made requisite under the 5th Circuit Rules, the Clerk lacked jurisdiction and discretion to dismiss the Appeal pursuant to any post notice authority arising under the rule.

3. Clerk Noticed Sherlock as to Dismissal of the Appeal

On or about 13 November 04, Sherlock received notice from the clerk, dated 9 November 04, (See: App. A.) allegedly acting pursuant to Fifth Circuit Rule 42.3.1.2 that this case "... is dismissed...". Particular note is made that the dismissal was dated 9 November 04, and was predicated on an alleged "...want of prosecution...". Dismissal was expressly stated to be due to Sherlock having failed to timely file Record Excerpts. Apparently, the dismissal pursuant to Rule 42.3.1.2, for alleged failure to file Record Excerpts, was executed, entered of record and mailed the same day, 9 November 04, despite the same Record Excerpts having been filed with the Clerk the morning of that same day.

4. Sherlock Filed His Motion to Reinstate Appeal

Subsequently, Sherlock filed his Motion to Reinstate Appeal, (App. E) made necessary due to the Rule 42.3.1.2 Clerk's initiated dismissal of 9 November 2004, "...for want of prosecution ..." alleged to be because of Sherlock's failure to file Record Excerpts which were in fact then already filed of record on the morning of 9 November 04. See: Docket Sheet - App. D.

5. Motion to Enlarge Time to File Record Excerpts Were Filed Contemporaneously with Motion to Reinstate Appeal

Coincident with the filing of his Motion to Reinstate Appeal, and in an abundance of caution, Sherlock filed his Motion to Enlarge time to File Record Excerpts. (App. G) However, the tender of the Motion was noticed by letter dated 16 November 04, to Sherlock by the Clerk as to the Motion being "...not filed...". See Clerk's Letter at App. H

6. Motion to Reinstate Appeal Filed and entered on Docket

Diligently, three days after being notice of the dismissal of his appeal, on 16 November 05, Sherlock filed his Motion to Reinstate Appeal and the same was docketed by the Clerk. App. E

7. Clerk Noted Filing of Record Excerpts but failed to Docket that Filing

On 16 November 05, the Clerk entered on the docket Sherlock's filing of his Motion to Reinstate Appeal and noted within that docket entry as follows: "...Default Remedied? (Y/N): Y (Record Excerpts received 11/9/04)...". However, the docket fails to otherwise reflect any docketing of Sherlock's actual filing of the Record Excerpts on 9 November 04 or any other date. See: Docket Sheet App. D

8. Fifth Circuit Panel Issues Order Denying Motion to Reinstate

Absent any response from opposing counsel, on 6 January 05, the Fifth Circuit Panel by Order denied Sherlock's Motion to Reinstate the appeal. See: Appendix ---

9. Motion for Rehearing of the Order Denying Motion to Reinstate filed.

On 22 February 05, Sherlock filed his Motion for Rehearing (docketed as Motion for Reconsideration) as to the Denial of Sherlock's previously filed Motion to Reinstate Appeal. See App. F

10. Fifth Circuit Panel Issues Order Denying Motion for Rehearing

Absent any response from Opposing Counsel, on 10 March 05, the Fifth Circuit Panel Ordered Sherlock's Motion for Reconsideration Denied and this Petition for Certiorari timely follows. App C

Pursuant to 28 U.S.C. Section 1254(1), et seq., Richard A. Sherlock respectfully seeks review by this Honorable Court.

REASONS FOR GRANTING THIS WRIT OF CERTIORARI

I.

**THE DECISIONS BELOW ARE IN CONFLICT WITH
THE FIFTH CIRCUIT'S OWN RULES AND PRIOR
OPINIONS.**

In cases where, as in the instant case, the Appellant is proceeding pro se, "*without counsel*", in the Fifth Circuit, and where the Clerk seeks to notice Appellant as to a deficiency in prosecuting a case, the 5th Circuit Rule 42.3.1.2 requires that "...[t]he clerk must issue a notice to appellant that 15 days from the date of the notice the appeal will be dismissed for want of prosecution...". No such notice - ie: giving notice of an intent to dismiss the appeal - was ever received by Sherlock in this case.

5th Circuit Rule 42.3.1.2 goes on to state that "*...If the default is remedied within that time, the clerk must not dismiss the appeal.*" Sherlock notes that under these circumstances, "*... that time...*" as qualified in the rule never starts to run because the required notice required under the rule was never given in the first instance. Accordingly, the Clerk, absent any notice properly given pursuant to the rule, lacked the jurisdiction and discretion to proceed to dismiss on

the authority of the same Rule 42.3.1.2 with which the clerk had previously failed to comply.

Sherlock did receive a letter notice from the Clerk dated, 13 October 04, giving notice of a deficiency as to record excerpts. (App. I) No mention of an intent to dismiss was contained in the letter or was ever given at any later time. Subsequently, Sherlock cured the noticed deficiency by filing the record excerpts intending to cure the deficiency notice by the Clerk's letter of 13 October 04.

Under these circumstances the Clerk, while failing to follow the appropriate 5th Circuit Rule, seeks to harshly and fatally impose that same rule on Sherlock to effect a dismissal of the appeal and deny to Sherlock his right to have his appeal adjudicated on the merits before a panel of the Fifth Circuit.

Further, the Fifth Circuit Panel's Order overruling Sherlock's Motion to Reinstate in this case, Order dated 6 January 05, (App. B) is apparently inconsistent with the settled principles of the Fifth Circuit against a harshly imposed policy of dismissal in favor of a preferably liberal approach as set out in that Court's prior rulings.

For example, in Jureczki v. City of Seabrook, 668 F.2d 851 (5th Cir. 02/26/1982), the fifth circuit, relying on Conley v. Gibson, 1957, 355 U.S. 41, at 45-46, 78 S. Ct. 99, at 102, 2 L. Ed. 2d 80, stated that:

"In denying the plaintiff's request for reconsideration, the district court stated that it had dismissed the action "on the merits" ...
"...its [the district court's] action is contrary to the well-established policy of the federal rules that the plaintiff be given every opportunity to state a claim. We echo our earlier position on the question of dismissal with prejudice: "In the decided cases it is recognized that the dismissal of a case with prejudice is a drastic remedy to be used only

in those cases where a lesser sanction would not better serve the interests of justice." Brown v. Thompson, 5 Cir. 1970, 430 F.2d 1214, 1216."

There can be no doubt that a procedural dismissal by a Clerk is a harsh remedy – even in the face of a strictly adhered to procedure which faithfully and dutifully includes the required notice of intent to dismiss.

However, in this case no notice of an intent to dismiss was given – the rule was itself not followed by the Clerk who later dismissed Sherlock's appeal based upon that very rule. It would seem wildly inconsistent for the Fifth Circuit to on the one hand speak as to a litigant being "...given every opportunity..." to cure the defect noticed while on the other hand harshly dismissing this case when the underlying and empowering rule was itself not complied with as to the requisite strict notice requirements expressly set out in the 5th Circuit Rule 42.3.1.2.

Ostensibly the very purpose of the rule is to place the litigant on actual notice as to the consequences of dismissal in the event the defects noticed are not timely cured. But, as set out clearly above, what's missing here in this case is any notice as to intended dismissal itself absent which the Clerk having thusly failed to comply with the rule was not thereafter justly and properly authorized to employ that rule to effect a dismissal as was so harshly impose upon Sherlock and his appeal in this case.

The great division in these two rulings of the Fifth Circuit, the Brown ruling noted above and this instant case, palpably leaves a broad gulf of inconsistency which compels a just and corrective action by this Court. The Fifth Circuit Panel's 6 January 05 ruling denying Sherlock's Motion to Reinstate must be reversed.

II.

THE DECISIONS BELOW ARE AT VARIANCE WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS; CONSTITUTE A DENIAL OF DUE PROCESS AND EQUAL PROTECTION AND ARE INCONSISTENT WITH THE PRIOR RULINGS OF THIS COURT.

This Court has stated that pro se litigants are to be afforded a less stringent standard than represented litigants particularly in cases where dismissal is an issue. Consistent with this Court's ruling in Hanes v Kerner, infra, in Noll v Carlson, 809 F.2d 1446 (9th Cir. 02/13/1987) the Ninth Circuit Court of Appeals, quoting this Court opinion in Hanes v Kerner, infra, and stated the point as follows:

"The rule favoring liberality in amendments to pleadings is particularly important for the pro se litigant. Presumably unskilled in the law, the pro se litigant is far more prone to making errors in pleading than the person who benefits from the representation of counsel. Indeed, this court has previously held that allegations of a pro se complaint are held to less stringent standards than formal pleadings drafted by lawyers. Haines v. Kerner, 404 U.S. 519, 520-21, 30 L. Ed. 2d 652, 92 S. Ct. 594, 404 U.S. 519, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972) (Per Curiam); see also Maurer v. Individually and as Members of Los Angeles County Sheriff's Dept., 691 F.2d 434, 437 (9th Cir. 1982); Gillespie v. Civiletti,

629 F.2d 637, 640 (9th Cir. 1980).” (See Noll, *supra*.)

The Ninth Circuit’s Noll court continued by observing that the notice and opportunity to cure the defects noted prior to dismissal are well reasoned, as was observed and acted upon by the Fifth Circuit’s opinion in Ayo v. Forest Bathey, 106 F.3d 98 (5th Cir. 02/10/1997). The Fifth Circuit’s opinion stated that reasoning as follows:

“The requirement t’ at courts provide a pro se litigant with notice of the deficiencies in his or her complaint helps ensure that the pro se litigant can use the opportunity to amend effectively. Without the benefit of a statement of deficiencies, the pro se litigant will likely repeat previous errors. This is equally true for the pro se litigant who amends his complaint at his own instance without any guidance from the court. Amendments that are made without an understanding of underlying deficiencies are rarely sufficient to cure inadequate pleadings.” (See: Noll, *supra*.)

In the present case, it was the duty of the Fifth Circuit Clerk to notice Sherlock as to certain deficiencies as well as an intent to dismiss and in doing so to comply with the rules established to provide specific procedure to the guiding principles and ruling of this court as are consistent with due process of law.

However, there was a breakdown in application of the Fifth Circuit rule and by a failure to give notice of an intent to dismiss the exact problem predicted in Noll was actually experienced in this case. As the Noll Court stated, “...without any guidance from the court...” - - and absent the Clerk’s compliance with the rules established for that purpose in this case there could be no judicial guidance – the pro se litigant

is left to the vicissitudes of an inconsistently applied harsh rule which in this case was fatal to Sherlock's appeal resulting in a clerical and procedural dismissal of the appeal. Sherlock simply did not get the required notice from the Clerk or the Fifth Circuit Court as was, in part, the intent to provide due process notice behind the rule in the first instance.

Since the facts and circumstances surrounding the Clerk's Letter Order of 9 November 04 dismissing this case is inconsistent with and lacked the essential condition precedent to dismissal – ie: notice of an intent to dismiss – the dismissive Order is contrary to the principles of due process. No notice to Appellant as to the potential for dismissal renders the resulting Clerk's Letter Order of 9 November 05 utterly inconsistent with the Fifth Circuit Rules as well as the guiding principles of this Court. The dismissal by the Clerk under these circumstances is contrary to the prior holdings of this court and is inconsistent with the principles of due process of law afforded to pro se litigants as is consistent with the guiding principles set out by this Supreme Court.

The underlying dismissal appears to be deficient and wanting as a matter of due process and equal protection as is guaranteed to the Appellant via the application of the rule of law set out in the 14th Amendment and as provided by the prior rulings of this court.

The breakdown in misapplication of the rule of law by the Fifth Circuit Clerk as expressly prescribed by 5th Circuit Rule 42.3.1.2 needs the corrective action of this Court. Reason, due process, equality, and consistency in the procedural application of the underlying and guiding principles of notice require a reversal of the Clerk's letter Order together with the Orders of the Fifth Circuit Panel dated 6 January 05 and 10 March 05 in the case below.

III. CONCLUSION

For the reasons above stated, and in light of all the premises, this Court should grant this Petition for a Writ of Certiorari.



Richard A. Sherlock, pro se
6409 Gillen Street
Metairie, Louisiana 70003
(504) 887-2961

APPENDIX

- Appendix A Letter Order of the Clerk of the Fifth Circuit Court of Appeals dated 9 November 04
- Appendix B Order of the Fifth Circuit Denying Motion to Reinstate Appeal dated 6 January 05
- Appendix C Order of the Fifth Circuit Denying Motion for Rehearing dated 10 March 05
- Appendix D Docket Sheet in the Case before the Fifth Circuit below
- Appendix E Motion to Reinstate Appeal
- Appendix F Motion for Rehearing of Order Denying Reinstatement of Appeal
- Appendix G Motion to Enlarge time to File Record Excerpts
- Appendix H Clerk's letter to Richard A. Sherlock dated 16 November 04 noting that Sherlock's previously tendered Motion to Enlarge Time was "not filed"
- Appendix I Clerk's letter notice to Richard A. Sherlock dated 13 October 04 as to deficiencies in filing Record Excerpts

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-30163

UNITED STATES OF AMERICA

Plaintiff – Appellee

U.S. Court of Appeals
Fifth Circuit

FILED

November 9, 2004

Charles R. Fulbruge III
Clerk

v.

RICHARD A SHERLOCK; ET AL

Defendants

RICHARD A SHERLOCK

Defendant - Appellant

Appeal from the United States District Court for the
Eastern District of Louisiana, New Orleans

CLERK'S OFFICE:

Under 5th CIR. R. 42.3, the appeal is

dismissed as of November 9, 2004, for want of

prosecution. The appellant failed to timely file record

excerpts.

CHARLES R. FULBRUGE III
Clerk of the United States Court
of Appeals for the Fifth Circuit
By: "s/ _____"
Kim Folse, Deputy Clerk

ENTERED AT THE DIRECTION OF THE COURT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-30163

U.S. COURT OF APPEALS
FILED
JAN 6 2005
CHARLES R. FULBRUGE III
CLERK

UNITED STATES OF AMERICA

Plaintiff – Appellee

v.

RICHARD A SHERLOCK; ET AL

Defendants

RICHARD A SHERLOCK

Defendant – Appellant

Appeal from the United States District Court for the
Eastern District of Louisiana, New Orleans

Before DAVIS, SMITH, and DENNIS, Circuit Judge.

PER CURIAM :

IT IS ORDERED that appellant's motion to
reinstate appeal is Denied.

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IT IS FURTHER ORDERED that appellee's

motion for sanctions in the amount of \$6000.00 is

Granted.

THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-30163

U.S. COURT OF APPEALS
FILED
MARCH 19, 2005
CHARLES R. FULBRUGE III
CLERK

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

RICHARD A SHERLOCK; ET AL

Defendants

RICHARD A SHERLOCK

Defendant - Appellant

Appeal from the United States District Court for the
Eastern District of Louisiana, New Orleans

Before DAVIS, SMITH, and DENNIS, Circuit Judges.

PER CURIAM:

This panel previously denied appellant's motion to

reinstate appeal and granted appellee's motion for sanctions
in the amount of \$6000.00.

The panel has considered appellant's motion for
rehearing as a motion for reconsideration. IT IS
ORDERED that the motion is Denied.

General Docket
US Court of Appeals for the Fifth Circuit

Court of Appeals Docket #: 04-30163 Filed: 2/26/04
Nsuit: 1870 Tax Suits: Taxes
USA v. Sherlock
Appeal from: Eastern District of Louisiana, New Orleans

Lower court information:

District: 053L-2 : 94-CV-1867-K
Ordering Judge: Stanwood
R Duval, Jr, US District Judge
Date Filed: 6/6/94
Date order/judgment: 9/26/96
Date NOA filed: 2/19/04

Fee status: Paid

Prior cases:

97-30245 EGJ FPB RMP
Date filed: 3/12/97 Date disposed: 12/18/97
Disposition: affd

Current cases:

None

04-30163 USA v. Sherlock
UNITED STATES OF AMERICA
Plaintiff - Appellee
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v.

RICHARD A SHERLOCK
Defendant - Appellant

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[NTC pse]
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Metairie, LA 70003

04-30163 USA v. Sherlock

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

RICHARD A SHERLOCK; ET AL

Defendants

RICHARD A SHERLOCK

Defendant - Appellant

04-30163 USA v. Sherlock

2/26/04 Tax case from district court docketed.
NOA filed by Appellant Richard A Sherlock. [04-30163] (cmb)

3/10/04 Record on appeal filed. Vol(s) of Pleadings: 3
Vol(s) of Transcripts: 1 Exhibits: 1 box. [04-30163] ROA
ddl satisfied. (jca)

3/22/04 Briefing notice issued. [04-30163] A/Pet's
Brief due on 5/3/04 for Richard A Sherlock. (jca)

3/29/04 Appearance form filed by Ellen Page DelSole
for Appellee USA. [04-30163] (jmm) -

5/12/04 CLERK Order filed dismissing appeal pursuant
to Local Rule 42 (Appellant's failure to file brief and record
excerpts) [4832242-1] Copies to all counsel. [04-30163]
(kkf)

5/19/04 Unopposed motion filed by Appellant Richard
A Sherlock to reinstate case [4838459-1] Default
Remedied? (Y/N): n, to extend time to file appellant's brief
for 45 days from this date. [4838459-2] Date of COS:
5/19/04 Sufficient [Y/N]: y [04-30163] (agl)

Page 3 of Seven Pages

5/19/04 CLERK Order filed granting appellant's unopposed motion to reinstate case [4838459-1], granting appellant's unopposed motion to extend time to file Appellant's Brief [4838459-2]. A/Pet's Brief ddl updated to 7/2/04 for Richard A Sherlock. Copies to all counsel. [04-30163] (kkf)

5/19/04 Case reopened. [04-30163] (kkf)

7/1/04 Unopposed motion filed by Appellant Richard A Sherlock to extend time to file appellant's brief for 30 days until 8/1/04. [4877659-1] Date of COS: 7/1/04 Sufficient [Y/N]: y [04-30163] (agl)

7/2/04 CLERK Order filed granting in part unopposed motion to extend time to file Appellant's Brief [4877659-1]. A/Pet's Brief ddl updated to 7/30/04 for Richard A Sherlock. Copies to all counsel. [04-30163] (kkf)

7/29/04 Unopposed motion filed by Appellant Richard A Sherlock to extend time to file appellant's brief until 8/30/04. [4900767-1] Date of COS: 7/29/04 Sufficient [Y/N]: y [04-30163] (agl)

7/30/04 CLERK Order filed granting appellant's unopposed motion to extend time to file Appellant's Brief [4900767-1]. A/Pet's Brief ddl updated to 8/30/04 for Richard A Sherlock. Copies to all counsel. [04-30163] (kkf)

8/26/04 Record on appeal released to Appellant Richard A Sherlock. Volumes: 4 Exhibits: 1 box. [04-30163] (kkf)

8/30/04 Motion filed by Appellant Richard A Sherlock to extend time to file appellant's brief for 31 days until 9/30/04. [4931047-1] Date of COS: 8/30/04 Sufficient [Y/N]: y [04-30163] (agl)

8/31/04 CLERK Order filed granting motion to extend time to file appellant's Brief [4931047-1]. NO FURTHER

EXTENSIONS WILL BE GRANTED. A/Pet's Brief ddl updated to 9/30/04 for Richard A Sherlock. Copies to all counsel. [04-30163] (kkf)

9/30/04 Motion filed by Appellant Richard A Sherlock to extend time to file appellant's brief for 15 days until 10/15/04. [4958501-1] Date of COS: 9/30/04 Sufficient [Y/N]: y [04-30163] (agl)

10/5/04 COURT Order filed granting appellant's motion for an extension of time to file a brief. Mr. Sherlock is hereby given an extension, to and including October 12, 2004, to file his brief [4958501-1]. A/Pet's Brief ddl updated to 10/12/04 for Richard A Sherlock. (JLD) Copies to all counsel. [04-30163] (kkf)

10/12/04 Record on appeal returned to 5CCA. Volumes: 4 Exhibits: 1 box [04-30163] (jmm)

10/12/04 Appellant's Brief filed by Appellant Richard A Sherlock. Copies of Brief: 7 # of pages: 23 Date of COS: 10/12/04 Hand Delivered [Y/N] : n Disk Provided [Y/N]: n Sufficient [Y/N]: y. [4969462-1] [04-30163] A/Pet's Brief ddl satisfied. E/Res's Brief due on 11/12/04 for USA. Record Excerpts due on 10/25/04 for Richard A Sherlock. (jca)

10/21/04 Record on appeal released to attorney Ellen Page DelSole for Appellee USA. Volumes: 4 Exhibits: 1 box. [04-30163] (dsb)

11/9/04 CLERK Order filed dismissing appeal pursuant to Local Rule 42 (appellant's failure to file record excerpts) [4995406-1] Copies to all counsel. [04-30163] (kkf)

11/9/04 Record on appeal requested from Ellen Page DelSole for Appellee USA. [04-30163] Miscellaneous due on 11/19/04 for USA. (kkf)

11/15/04 Motion filed by Appellee USA for sanctions and damages in the amount of \$6,000 pursuant to 28 USC 1912 and Fed. R. Ap. P. Rule 38 [4999939-1].

Response/Opposition due on 11/29/04. Date of COS:

11/12/04 Sufficient [Y/N]: y [04-30163] (agl)

11/16/04 Motion filed by Appellant Richard A Sherlock to reinstate case [5002116-1] Default Remedied? (Y/N): Y (Record Excerpts received 11/9/04)

Response/Opposition due on 12/2/04. Date of COS:

11/16/04 Sufficient [Y/N] : Y [04-30163] (kkf)

11/16/04 Record on appeal returned to SCCA. Volumes: 3 Exhibits: 1 box. Vol. #4 sent under separate cover, not yet received. [04-30163] (jmm)

11/17/04 Appearance form filed by Charles Bricken for Appellee USA. [04-30163] (No. of forms filed: 1) (jmm)

11/22/04 Record on appeal returned to SCCA. Volumes: 1 (Volume #4) [04-30163] Miscellaneous ddl satisfied. (tb)

11/30/04 Response/opposition filed by Appellant Richard A Sherlock to motion for damages under Rule 38 [4999939-1] by Appellee USA. Response/Opposition ddl satisfied. Reply to Resp/Opp due on 12/10/04. Date of COS: 11/30/04 Sufficient [Y/N]: Y [5014651-1] [04-30163] (kkf)

12/9/04 Reply filed by Appellee USA to response/opposition [5014651-1] to motion for damages under Rule 38 [4999939-1]. Reply to Resp/Opp due ddl satisfied. Sufficient [Y/N]: y [5022059-1] [04-30163] (agl)

1/6/05 COURT Order filed denying appellant's motion to reinstate appeal [5002116-1], granting appellee's motion for sanctions in the amount of \$6000.00 [4999939-1]. (WED/JES/JLD) Copies to all counsel. [04-30163] (kkf)

2/22/05 Motion for Rehearing treated as a motion filed by Appellant Richard A Sherlock [5087881-1] for reconsideration of motion to reinstate case [5002116-1] by Appellant Richard A Sherlock, motion for damages under Rule 38 [4999939-1] by Appellee USA Date of COS: 2/22/05 Sufficient [Y/N]: Y [04-30163] (kkf)

3/3/05 Response/opposition filed by Appellee USA to motion for reconsideration [5087881-1] by Appellant Richard A Sherlock Date of COS: 3/2/05 Sufficient [Y/N]: Y [5097148-1] [04-30163] (mfn)

3/10/05 COURT Order filed denying motion for reconsideration [5087881-1] (WED/JES/JLD) Copies to all counsel.[04-30163] (jmm)

3/11/05 Record on appeal returned to 5CCA.
Volumes: 4 Exhibits: 1 box [04-30163] (jmm)

3/11/05 Record on appeal returned to USDC.
Volumes: 4 Exhibits:
1 box. [04-30163] (jmm)

**IN THE UNITED STATES COURT OF APPEAL
FOR THE FIFTH CIRCUIT
NEW ORLEANS, LOUISIANA**

UNITED STATES OF AMERICA,)
)
Plaintiff- Appellee)
Vs. U.S. COURT OF APPEALS))
Nov 16 2004)
NO: 04-30163)
)
RICHARD A. SHERLOCK,)
)
Defendant- Appellant)

TO THE HONORABLE JUDGES OF SAID COURT:

MOTION TO REINSTATE APPEAL

NOW COMES RICHARD A. SHERLOCK, the Appellant, here proceeding pro se, in the above styled and numbered cause of action now properly on appeal before this honorable court and files his Motion to Reinstate Appeal and for cause thereon respectfully shows unto this honorable court as follows:

**1.
BACKGROUND**

1. This appellate case was timely and properly appealed from the United States District Court for the Eastern District of Louisiana at New Orleans, Louisiana, in cause number **94-1867-K5**.

2. Appellant has received notice from the clerk pursuant to Fifth Circuit Rule 42.3 that this case "... is dismissed as of November 9, 2004, for want of prosecution. The appellant failed to timely file record excerpts."

3. Previously, on the same day, November 9, 2004, and without any knowledge of the then intended notice of dismissal by the clerk, Appellant did file his Record Excerpts with the clerk of this court.

4. This appeal is now requested to be reinstated due to the fact that under the circumstances described below, including significant chronic medical distractions combined with no notice of the prospective dismissal being received by Appellant, and in light of the Appellant having then already having filed the said Record Excerpts, Appellant has excusably failed to timely lodge his Record Excerpts with the clerk of this court...

5. Appellant is proceeding pro se before this court and on this appeal.

II.

APPELLANT RECEIVED NO NOTICE OF DISMISSAL OF HIS APPEAL PURSUANT TO 5th CIR. R. 42.3

6. Prior to receiving any notice or having any knowledge of the clerk's intended notice of dismissal, ie: that the "appeal is [to be] dismissed as of November 9, 2004, for want of prosecution ...",

Appellant had previously received no notice that the Appeal would be dismissed if the defect/default as to Record Excerpts had not been corrected by filing same.

7. 5th Cir. R. 42.3 states in pertinent part as follows:

"42.3.1.2 Appeals without Counsel. The clerk must issue a notice to appellant that 15 days from the date of the notice the appeal will be dismissed for want of prosecution, unless the default is remedied before that date. If the default is remedied within that time, the clerk must not dismiss the appeal."

8. On the same day, 9 November 04, Appellant had in fact filed of record with the clerk the record excerpts that were alleged to be not filed in the clerk's notice of dismissal. Thus the defect noticed for the first time in the notice of dismissal was "cured" on the very day of that notice and before Appellant had even received or even had knowledge of the clerk's notice of dismissal.

III.

APPELLANT'S MOTION TO ENLARGE TIME TO FILE RECORD EXCERPTS IS TENDERED TO THE CLERK COINCIDENT WITH THIS MOTION TO REINSTATE

9. In an abundance of caution, and coincident with Appellant's filing this Motion to Reinstate, Appellant has prepared and tendered to the clerk Appellant's Motion to Enlarge Time to File Record Excerpts.

10. The said Appellant's Motion to Enlarge Time to File Record Excerpts is filed herewith this Motion to Reinstate.

IV.

APPELLANT HAS BEEN BURDENED WITH SIGNIFICANT AND LIFE THREATENING PERSONAL AND FAMILY MEDICAL INCIDENTS DURING HIS COMPLIANCE WITH THE RULES OF THIS COURT.

11. Appellant and his family have suffered significant and life threatening medical problems throughout this appeal. Appellant's *compliance with* the requirements of this appeal and the rules of this court have been difficult during the pendency of significant and life threatening medical problems.

12. Appellant has previously made request of the clerk and of this court respecting added time in light of the ongoing personal and family medical incidents and convalescence to which this court has been both accommodating and

generous. As a result, *Appellant has been* able to meet the requirement of this appeal in light of the Federal Rules of Appellant Procedure and the local 5th Circuit Rules of this court.

13. Appellant respectfully request that the continuing burden of related and ongoing medical difficulties be considered in the light of this Motion to Reinstate and the coincident Motion to Enlarge Time to File Record Excerpts which were have already been lodged with the clerk of this court on 9 November 04.

14. A review of the record and docket in this case will reflect evidence of the foregoing medical travail and request for added time and the granting of added time within which to comply with the rules of this court.

15. This court has previously taken notice of and has already recognized the medical problems noticed to the court by Appellant. Appellant requests that that judicial notice be continued in light of the current Motion to Reinstate and the current Motion to Enlarge Time to File Record Excerpts which are, as noted above, already filed with the clerk of this court as of 9 November 04.

V.

MOTION TO REINSTATE HAS BEEN TIMELY AND PROMPTLY FILED

16. This presently filed Motion to Reinstate together with Appellant's filed Motion to Enlarge Time to File Record Excerpts is timely and promptly filed with the clerk of this court upon Appellant's receipt of the clerk's notice of dismissal. Notice of Dismissal was received by Appellant on or about Saturday, 13 November 04.

17. This request is being urged by Appellant so that justice may be done by affording to Appellant his fight to due process of law and not for any purpose of delay or other distraction.

WHEREFORE PREMISES CONSIDERED,

Appellant requests that this court grant in all things this his Motion to reinstate this Appeal and to undertake to recall the mandate issued in this case. Appellant further requests that his Motion to Enlarge Time to File Record Excerpts be favorably considered and granted by this court as having been timely and properly filed with the clerk of this court and that the Appellant's Record Excerpts be deemed to have been timely filed with the clerk in this case under these circumstances. Appellant requests other relief to which he is entitled. Appellant requests justice.

Respectfully submitted, _____

“s _____”

RICHARD A. SHERLOCK, Appellant, Pro se
6409 Gillen Street
Metairie, Louisiana 70003
(504) 887-2961

CERTIFICATE OF CONFERENCE

I hereby certify that I have placed a telephone call to the office of Ellen Page Delsole, the Appellate Briefing Attorney assigned to this case, in Washington DC at 202-514-8128 and as result of that call I was told that she would not consent to the foregoing Motion to Reinstate but she would not file any written opposition.

“s _____”

RICHARD A. SHERLOCK

CERTIFICATE OF SERVICE

_____ I hereby certify that a true and correct copy of the foregoing: **MOTION TO REINSTATE APPEAL** has on this the 16th day of November, 2004, been mailed to all counsel of record in this action including the following parties at their respective address as indicated:

Ellen Page Delsole, Appellate Section
601 D Street NW, Room 7909
P.O. Box 502
Washington DC 20044

“s _____”

RICHARD A. SHERLOCK

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
NEW ORLEANS, LOUISIANA**

**U.S. COURT OF APPEALS
RECEIVED
FEB 22 2005
NEW ORLEANS, LA**

UNITED STATES OF AMERICA,)
Plaintiff- Appellee)

NO:04-30163)

VS.)

RICHARD A. SHERLOCK,)
Defendant- Appellant)

TO THE HONORABLE JUDGES OF SAID COURT:

**MOTION FOR REHEARING ORDER DENYING
MOTION TO REINSTATE APPEAL AND FOR
ORDER GRANTING SANCTIONS**

NOW COMES RICHARD A. SHERLOCK, the Appellant, here proceeding pro se, in the above styled and numbered cause of action now properly on appeal before this honorable court and files his Motion for Rehearing of this Court's Order, dated 6 January 05, Denying Appellant's Motion to Reinstate Appeal and Granting Appellee's motion for Sanctions against Appellant and for cause thereon respectfully shows unto this honorable court as follows:

I. BACKGROUND

1. This appellate case was timely and properly appealed from the United States District Court for the Eastern District of Louisiana at New Orleans, Louisiana, in cause number **94-1867-K5**.

2. After receiving letter notice of a deficiency as to Record Excerpts via clerk's letter dated 13 October 04, Appellant's Record Excerpts was tendered to the clerk for filing on the morning of 9 November 04. The filing of Record Excerpts was made without any knowledge at that time by Appellant of the then – apparently – intended notice of dismissal noticed to Appellant via mail by the clerk later the same day on 9 November 04.

3. On or about 13 November 04, Appellant received notice from the clerk pursuant to Fifth Circuit Rule 42.3 that this case "... is dismissed...". The dismissal was dated 9 November 04, and was made for and alleged "...want of prosecution...". Dismissal was expressly stated to be due to the appellant having failed to timely file record excerpts.

Apparently, the dismissal pursuant to 42.3, for alleged failure to file Record Excerpts, was executed, entered of record and mailed the same day: 9 November 04 – despite the same Record Excerpts having been filed with the clerk the morning of that same day.

4. Appellant filed his Motion to Reinstate Appeal, made necessary due to the Rule 42.3 dismissal on or about 9 November 2004, "...for want of prosecution ..." alleged to be because of the alleged failure to file Record Excerpts which were in fact then already filed of record.

5. Coincident with the filing of Appellant's Motion to Reinstate Appeal, Appellant filed his Motion to Enlarge time to File Record Excerpts but the same was noticed to

Appellant by the clerk as to the Motion being not filed by letter dated 17 November 04.

6. On or about 16 November 04, Appellee made their Motion for Sanctions – contemporaneously filed with Appellee's Reply Brief in this case. It is this Motion for Sanctions which was granted by this court's Order of 6 January 05 – and the same is here the subject of Appellant's Motion for Rehearing.

7. The Court's Order of 6 January 05 is now requested to be revisited by this panel in light of the following facts and argument together with authority in support.

8. This appeal is now, by this motion for rehearing, requested to be reinstated and the sanctions set aside due to the fact that under the circumstances described below, including significant chronic medical distractions combined with no notice of the prospective dismissal being received by Appellant, and in light of the Appellant having then already having filed the said Record Excerpts, Appellant has excusably failed to timely lodge his Record Excerpts with the clerk of this court.

9. Further, the Motion for Sanction and Relief obtained thereby under the circumstances in this case do not comport with the rules of this court, are in conflict with the holdings of this court and are inconsistent with the principles of due process of law in that a less harsh remedy would be appropriate in this case so that the underlying issues may be properly heard and disposed of on their merits instead of summary dismissal as was imposed by this court's order of 6 January 05.

II.

SUMMARY BASIS OF THIS MOTION FOR RECONSIDERATION

10. There are three basis of this motion for reconsideration.

11. First, the underlying Notice of Dismissal dated 9 November 04 is deficient as a matter of law due to its being inconsistent with the facts and circumstances in this case, lacked any notice to Appellant as to the potential for dismissal, is inconsistent with the local rules of this court, is contrary to the prior holdings of this court in similar cases and is inconsistent with the principles of due process of law afforded to pro se litigants as set out by the supreme court of the United States of America.

12. Secondly, the sanctions which have on the Motion of the United States been granted against the Appellant are inconsistent with the prior holdings of this court in similar cases and are inconsistent with the principles of due process of law afforded to pro se litigants as set out by the supreme court of the United States of America.

13. Lastly, the costs and burden of which the Appellee complains in their Motion for Sanctions were knowingly undertaken by Appellee after the Appellee knew, or should have known, that the costs and burdens were avoidable. Notice of probable sanctionable activity is served.

III.

MOTION FOR REHEARING ORDER OF 6 JANUARY 05 OVERRULING APPELLANT'S MOTION TO REINSTATE APPEAL

14. After receiving the clerks letter notice to file Record Excerpts, Appellant did so on the morning of 9 November 04.

15. Appellant received the clerks notice of Dismissal pursuant to Rule 43.2 *dated 9 November 04* on or about Saturday, 13 November 04 and on 16 November 04 Appellant filed a Motion to Reinstate Appeal and, in an abundance of caution, secondly, Appellant's Motion to Enlarge time to file the Record Excerpts previously tendered to the clerk on 9 November 05.

16.5th Cir. R. 42.3 states in pertinent part as follows:

"42.3.1.2 Appeals without Counsel. The clerk must issue a notice to appellant that 15 days from the date of the notice the appeal will be dismissed for want of prosecution, unless the default is remedied before that date. If the default is remedied within that time, the clerk must not dismiss the appeal."

17. The clerk's dismissal of this appeal on 9 November 04, pursuant to Rule 42.3 against this Appellant proceeding without counsel, is thus inconsistent with the rules of this court in that 1) Appellant received no 15 day notice as is expressly required by the rules; 2) Appellant received no notice that this appeal would be dismissed if the deficiency was not cured within time as is expressly required by the rules, and 3) Appellant was denied notice that "...[I]f the default is remedied within that time, the clerk must not dismiss the appeal...". *(emphasis added to text of Rule 42.3)*

18. The Appellee has made no affirmative or substantive response to Appellant's 16 November 04 Motion to Reinstate or otherwise filed or made any opposition to Appellant's Motion to Enlarge time to File Record Excerpts. Thus, the Appellant's motions are effectively unopposed.

19. Further, this court's rifling of 6 Janum3 '05 is apparently inconsistent with the settled principles set out in prior rulings of this court. For example, in Jureczki v. City of Seabrook, 668 F.2d 851 (5th Cir. 02/26/1982), the Fifth Circuit, relying on Conley v. Gibson, 1957, 355 U.S. 41, at 45-46, 78 S. Ct. 99, at 102, 2 L. Ed. 2d 80, stated that:

"In denying the plaintiff's request for reconsideration, the district court stated that it had dismissed the action "on the merits" ... "...its [the district court's] action is contrary to the well-established policy of the federal rules that the plaintiff be given every

opportunity to state a claim. We echo our earlier position on the question of dismissal with prejudice: "In the decided cases it is recognized that the dismissal of a case with prejudice is a drastic remedy to be used only in those cases where a lesser sanction would not better serve the interests of justice." *Brown v. Thompson*, 5 Cir. 1970, 430 F.2d 1214, 1216."

20. Further, in *Ayo v. Forest Bathey*, 106 F.3d 98 (5th Cir. 02/10/1997), a Louisiana prisoner pro se appeal pursuant to 28 USC 1915, Ayo petitioned and obtained IFP (in forma pauperis) status on appeal but was deficient in meeting the statutory requirements of that appeal. This court said: "We decline to reach the merits of Ayo's appeal, however, as he has not complied with the PLRA's amended procedure for IFP certification." But prior to actual dismissal of the appeal pursuant to Rule 42.3, Ayo was noticed and threatened, within the court's opinion, as to dismissal when the fifth circuit noticed Ayo of his defects, and afforded him time to cure the defects after which his case was to be dismissed pursuant to Rule 42.3. The distinction with the instant case being, of course, that this court afforded Ayo of his right to be noticed of the threatened dismissal, given a specific time without to cure the defects after which a dismissal would ostensibly occur. No such consideration was afforded the Appellant in this case.

21. The United States Supreme Court has stated that pro se litigants are to be afforded a less stringent standard than represented litigants primarily in cases where dismissal is an issue. In *Noll v Carlson*, 809 F.2d 1446 (9th Cir. 02/13/1987) the ninth Circuit Court of Appeals, quoting the US Supreme Court in *Hanes v Kerner*, *infra*, stated the point as follows:

"The rule favoring liberality in amendments to pleadings is particularly important for the pro se litigant. Presumably unskilled in the law, the pro se litigant is far more prone to making errors in pleading than the person who benefits from the representation of counsel. Indeed,

the Supreme Court has held that allegations of a pro se complaint are held to less stringent standards than formal pleadings drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519, 520-21, 30 L. Ed. 2d 652, 92 S. Ct. 594, 404 U.S. 519, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972) (Per Curiam); see also *Maurer v. Individually and as Members of Los Angeles County Sheriffs Dept.*, 691 F.2d 434, 437 (9th Cir. 1982); *Gillespie v. Civiletti*, 629 F.2d 637, 640 (9th Cir. 1980)." (See Noll, supra.)

22. The Noll court continued by observing that the notice and opportunity to cure the defects noted prior to dismissal are well reasoned, as was observed and acted upon by this court in *Ayo*, supra, and stated that reasoning as follows:

"The requirement that courts provide a pro se litigant with notice of the deficiencies in his or her complaint helps ensure that the pro se litigant can use the opportunity to amend effectively. Without the benefit of a statement of deficiencies, the pro se litigant will likely repeat previous errors. This is equally true for the pro se litigant who amends his complaint at his own instance without any guidance from the court. Amendments that are made without an understanding of underlying deficiencies are rarely sufficient to cure inadequate pleadings." (See: Noll, supra.)

23. Since the facts and circumstances surrounding the 9 November 04 dismissal in this case are inconsistent with lack of any notice to Appellant as to the potential for dismissal, is inconsistent with the local rules of this court, is contrary to the prior holdings of this court and is inconsistent with the principles of due process of law afforded to pro se litigants as set out by the Supreme Court of the United States of America the underlying dismissal appears to be deficient and wanting as a matter of due process guaranteed to this Appellant.

IV.
MOTION FOR REHEARING ORDER OF 6
JANUARY 05
GRANTING SANCTIONS AGAINST DEFENDANT
IN FAVOR OF APPELLEE

24. On or about 16 November 04, the present and offending Motion for Sanctions, and the basis of this court's Order granting same on 6 January 05, against Appellant was filed by Appellee with the clerk of this court coincident with the Appellee's reply brief on appeal in this case.

25. The Appellee's Motion: "...respectfully moves the Court for an order imposing sanctions of \$6,000 against appellant Richard A. Sherlock, pursuant to 28 U.S.C. § 1912 and Rule 38 of the Federal Rules of Appellate Procedure, for maintaining a frivolous appeal.

26. However, as can be seen by a review of this record, nowhere is there a finding of any court which holds that this appeal is "frivolous". Thus, the claim of "frivolous" is a fiction which the Appellee has invented to first misrepresent to this court and then, secondly, to seduce this court to sign an order granting sanctions against the Appellant and in holding the prior defective 9 November 04 dismissal of this appeal. Thusly, the Appellee seeks to "pile on" and seek advantage over the appellant due to the mistakes of the clerk of this court as to the required notice requirements and resultant dismissal dated 9 November 04.

27. Further, the Motion for Sanctions claims that the District Court below has warned Appellant that the Appellant pleadings "...verges on a sanctionable action" See: Record at (R. 603-05). Appellant respectfully observes the distinction between verges on sanctionable action and sanctionable action itself. Further, Appellant observes that the statement was that of the District Court and not the statement and/or notice of this court and/or Appellee. This court has previously noted in Coghlan v. Starkey, 852 F.2d 806 (5th Cir. 08/08/1988) that:

“this court has no desire to deter any litigant from advancing any claim or defense which is arguably supported by existing law, or any reasonably based suggestion for its extension, modification, or reversal. Positions thus taken cannot be considered as frivolous, although they may be unsuccessful and indeed may be given short shrift. Ferguson v. Mbank Houston, N.A., 808 F.2d 358, 359 (5th Cir.1986)”

28. Unlike Singleton v. Peters, No. 04-40254 (5th Cir. 08/18/2004), Appellant here was not given any warning by this court – or the District Court below – as to specific actual sanctionable activity sufficient to place Appellant on notice that this very appeal, and its character or lack thereof, constituted sanctionable activity. (See: Singleton, supra, [caseclerk.com URL: [U] Singleton v. Peters, No. 04-40254 (5th Cir. 08/18/2004)] an unpublished 5th Cir Opinion cited here for its persuasive effect I facts and argument advanced by Appellant in this case – Appellant requests that the court take judicial notice of its prior but unpublished opinions located at the fifth circuit court.) See also: Coghlan v. Starkey, 852 F.2d 806 (5th Cir. 08/08/1988).

29. Appellant observes a difference between a comment by a District Judge relating to “...verges on a sanctionable action...” and the direct warning given in other cases to which this court has granted or upheld a dismissal of Appellants appeal.

30. Unlike, Stelly V Commissioner, 804 F.2d 868,870 (5th Cir. 1986), here the Appellant’s objections to the District Court’s Order for Sale of Property below is not without a reasonable foundation in law. Appellant argues that jurisdiction is both the legitimizing reason in this appeal and at the same time the basis of the Appellee’s reluctance to move more expeditiously on its underlying now more than eight year old judgment against Appellant. Even the Appellee has apparently- indeed demonstrably –

had doubts as to its own position to obtain the Order for Sale of Property here being appealed. As noted by the "travelogue" set forth in the Appellee's Motion for Sanctions filed 16 November 04, the distance between the underlying Judgment, on the one hand, and the Order for Sale, on the other hand, is expansively measured from 26 September 1996 to 29 August 2003 – a distance of almost seven (7) years. Why, one must ask, should the United States wait for nearly seven years to seek what they euphemistically have characterized to be a mere "ministerial" Order for the Sale of Property in Satisfaction of a judgment in Appellee's favor.

31. Appellant suggests that the reason for the delay is not "ministerial" at all but rather "material" and is based upon Appellee's good and valid reasons predicated upon a good and rational argument for the extension, modification, or reversal of precedent. In short, the Appellee's demonstrated trepidation - -by their own recitation of facts and in what they themselves have characterized as a "ministerial" act obtained from the District Court belatedly as it was by 7 years from the underlying judgment - -is well founded for some as yet undisclosed but ostensibly valid reason(s).

32. Appellant suggests that the reason for seven years delay in obtaining an Order on their judgment is that the underlying order for sale of property, here on appeal, utterly lacks any jurisdiction on which an Order for Sale of Property may rest. The Order is barred by limitations arising from Louisiana CC 2041.

33. Appellant draws a distinction between the underlying judgment and the more recent order for sale of property – here on appeal – ostensibly predicated on that now more than eight year old judgment. But the Appellee's reluctance in disclosing some explanative reason for their gross belatedness in this case merely serves and advances their claim that Appellant is engaged in sanctionable activity. It is an insidious and distractive misrepresentation to advance the foregoing argument on which Appellee's Motion for Sanctions rests.

34. The 9 November 04 dismissal occasioned by the actions of the clerk in this case, however wrongful it may have been, (See: Foregoing argument above in opposition to the dismissal of 9 November 04) luckily provided a convenient opportunity for the Appellee to further distract the court from the underlying fatal defects of jurisdiction for the Order to Sell Property here being appealed.

35. In the meantime, Appellant has suffered his own distractions which have affected this case as well as his very life – i.e.: the conditions in which he continues to breathe and live his life. That distraction, including several medical threats to his life, is well documented in the several motions for enlargement of time sprinkled across the record in this case. Appellant asks the court to take judicial notice of the content of those several motions outlining the serious and life threatening medical incidents which have afflicted both Appellant and his immediate family – i.e.: appellant's wife. Appellant would hope and pray that this court finds sufficient reason as well as room in the due process afforded to Appellant by the rules of Appellate procedure and the rules of this court to forgive some burden to the normal process born of such mortal distractions.

35. Nor is the Appellee without their own brand and specie of less valid but manufactured burdens on the appellate process. For example, the very cost to which Appellee complainingly goes on at some considerable – but very unspecific – length in their Motion for Sanctions is the very cost which they themselves undertook while knowing of the intent to seek sanctions in the first place. No portion of the underlying Motion contains any element of complaint which was not known to Appellee prior to undertaking the very cost to which Appellee now so vociferously and stridently complains. Appellee either knew, or should have known, that the effort they undertook was arguably unnecessary in light of their intended complaints as to the alleged frivolous nature of Appellant's brief - - but - - despite this knowledge, Appellee proceeded to undertake the burden and cost for which Appellee has now sought and

obtained sanctions and damage award(s) from this court. It is the type of activity which is disingenuous at best and simply wrong at the least; it is a path of conduct which should not receive the countenance of this court. It is not the stuff of which sanction is ordinarily made. It is a made up and contrived complaint born of its own created and sustained costs and burdens undertaken with full knowledge of the underlying alleged wrong of which Appellee has here so disingenuously but successfully complained.

37. Conversely, the conduct of the Appellee in this case is a very cleverly disguised but nonetheless still sanctionable activity of its own doing which is probably not only in violation of Rule 11 in the Federal Rules of Civil Procedure in the District Court below but also is contravened by and is in actual violation of Rule 38 of the Rules of Appellate Procedure. How clever of the Appellee to first belatedly wait seven years to seek and obtain an order for sale of property and then to complain of Appellant's appeal of that Order while seeking sanctions against Appellant along the way alleging a frivolous appeal. Neither Carl von Clausewitz nor Niccolo Machiavelli could not have done better than Appellee's machinations given the now revealed facts of this case.

38. Again, the burden and cost to which Appellee has sought and obtained relief from this court was and is predicated upon complaints as to activities, cost and argument which if had been made timely would have avoided the very cost to which Appellee now has obtained relief by sanctions against Appellant. The belated claims and untimely Motion for Sanctions against Appellant after knowingly incurring cost to answer Appellant's brief seems improvident at the least and actually sanctionable under Rule 38 at its disingenuous best.

39. Appellee has by their machinations thusly contributed to the very undertaking and necessity of cost to which they now wrongly and disingenuously claim and defend as being recoverable via sanctions.

40. Appellee have by their belated filing of their Motion for Sanctions, filed contemporaneousl with their Reply Brief, denied to the Appellant an opportunity of notice and opportunity to cure the underlying claimed of sanctionable activity. While repeatedly pointing out to this court that Appellant's activities were and are frivolous, the Appellee seeks by repetition to foment the fiction that this court – or some other court-has found this appeal to be sanctionable when in fact no court has made such a ruling or finding with observation of supporting findings, facts and circumstances. Appellee has thus sought to repeatedly argue that Appellant's appeal is frivolous and to thereby by sheer repetition create a self-fulfilling and self-sustaining prophesy but which lacks substance as a foundation in law and fact and circumstances as presented in this particular case.

V.

NOTICE OF PROBABLE SANCTIONABLE ACTIVITY

41. By this notice, Appellant serves formal notice on the Appellee, despite Appellee's failure to afford Appellant of the same consideration, that the Appellee's activities set out in paragraph III above are highly suspicious and are probably the basis of a Motion for Sanctions pursuant to the Rules of this court as well as the Federal Rules of Civil Procedure in the District Court below. Notice of the same is given to Appellee here with the hope that Appellee will recognize the tenuous posture of its machinations and will withdraw the offending Motion for Sanctions and Relief obtained thereby thus eliminating the necessity of Appellant to proceed with a Motion for Sanctions seeking relief, in part, for the misrepresentations and disingenuous nature of the Motions upon which this Motion for Rehearing is predicated.

43. Further, Appellant serves notice that the relief requested and obtained by the Appellee in this case from the District Court below as it pertains to an On Order for the Sale of the underlying subject real property is specifically barred by the

express language of the Louisiana Civil Code including but not limited to the provisions of Article 2041, et seq. Further, that the invocation of this added argument by Appellant is intended for purposes of extension, modification, or reversal of the existing Orders, facts and findings of the court in this case and on this appeal. See: United States v. Craft, 122 S.Ct. 1414, 152 L.Ed.2d 437 (U.S.04/17/2002). See also: Arsht v Davis, 89-C-2784 (La. 4/30/90); So. 2d 58; and Thomassie v Savoie, 90 CA 0248 (La. App. 1 Cir. 5/16/91); 581 So. 2d 1031.

WHEREFORE PREMISES CONSIDERED,

Appellant requests that this court grant in all things this his Motion for Rehearing as to the court's 6 January 05 Order overruling Appellant's Motion to Reinstate Appeal and Granting of the Appellee's Motion for Sanctions against Appellant and that after reconsideration of the foregoing under the circumstances and facts as are peculiar to this case that Appellant's outstanding Motion to Enlarge time Within which the Appellant's Record Excerpts may be timely filed be in all things Granted and that the Appellant be afforded a complete reinstatement of this appeal and that this case be reinstated on the docket of this court for disposition pursuant to the Appellate rules of this court and as per the further order of this court. Appellant requests other relief that is due and which is just. Appellant requests justice.

Respectfully Submitted,

“s _____”
RICHARD A. SHERLOCK, Appellant, Pro se
6409 Gillen Street
Metairie, Louisiana 70003
(504) 887-2961

CERTIFICATE OF CONFERENCE

I hereby certify that I have placed a telephone call to the office of Ellen Page Delsole, the Appellate Briefing Attorney assigned to this case, in Washington DC at 202-514-8128 and as result of that call, I was able to learn from Ellen Page Delsole that the above Motion for Rehearing is **OPPOSED.**

"s/"

RICHARD A. SHERLOCK

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing:

MOTION FOR REHEARING ORDER
OVERRULLING MOTION TO REINSTATE APPEAL
AND FOR ORDER GRANING SANCTIONS

has on this the 22nd day of February, 2005, been mailed to all counsel of record in this action Including the following parties at their respective address as indicated:

Ellen Page Delsole, Appellate Section
601 D Street NW, Room 7909 - -
P.O. Box 502
Washington DC 20044

"s/"

RICHARD A. SHERLOCK

Appendix G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
NEW ORLEANS, LOUISIANA
U.S.COURT OF APPEALS
RECEIVED
NOV 16 2004
NEW ORLEANS, LA

UNITED STATES OF AMERICA,)
Plaintiff- Appellee)
VS.) NO: 04-30163
RICHARD A. SHERLOCK)

TO THE HONORABLE JUDGES OF SAID COURT:

MOTION TO ENLARGE TIME
WITHIN WHICH APPELLANT'S RECORD
EXCERPTS MAY BE TIMELY FILED

NOW COMES RICHARD A. SHERLOCK, the
Appellant, in the above styled and numbered cause of
action now properly on appeal before this honorable court
and files his Motion to Enlarge Time within which
Appellant's Record Excerpts may be Timely Filed and For
cause thereon respectfully shows unto
this honorable court as follows:

I. BACKGROUND

1. This appeal is properly before this court having been
appealed from the United States District Court for the
Eastern District of Louisiana at New Orleans, Louisiana, in
cause number **94-1867-K5**.
2. Appellant's Record Excerpts are presently of record in
this case having been filed of record on 9 November 04.
This court has not previously granted any enlargement of
time respecting the Record Excerpts in this case.

3. In an abundance of caution, it is necessary under these circumstances that Appellants request an extension affording to Appellants additional and reasonable time within which his now filed Record Excerpts may be timely filed since this court has dismissed the appeal stating no Record Excerpts as the reason and the same notice being dated on the same day on which the Record Excerpts were lodged with the clerk of this court.

4. Appellant is proceeding pro se before this court and on this appeal.

II. MOTION TO ENLARGE TIME TO FILE RECORD EXCERPTS

5. The scope of the Appellant's task respecting the Appeal and with respect to the Record Excerpts is one in which the appellant, here nor experienced. Accordingly, enlargement of time to reflect that the already filed Record Excerpts having been timely filed is respectfully requested so that this appeal may proceed consistent with due process of law.

6. Appellant's preparation of the Record Excerpts and other compliance with the rules of this court have been and are frustrated by significant and ongoing cardiac and related medical incidents including hospitalization of Appellant Richard A. Sherlock as well as Appellant's family including Appellant's spouse and her hospitalization.

7. The Record Excerpts have already been lodged with the clerk and this Motion is being made incident with a Motion to Reinstate appeal in light of the Appellant having received a notice from the clerk as to dismissal of this appeal due to the Record Excerpts having not been filed. Absent a grant of additional time for the Record Excerpts to be deemed timely filed, Appellant, here proceeding pro se, will suffer the unreasonable hardship of dismissal of this appeal.

8. Accordingly, it is necessary that Appellant requests that the clerk enlarge time within which the Record Excerpts be filed be enlarged to at least 9 November 04, the day on which the Record Excerpts were in fact filed with the clerk.

9. This request is being urged by Appellant so that justice may be done by affording to Appellant his right to due process of law and not for any purpose of delay.

WHEREFORE PREMISES CONSIDERED,

Appellant requests that this court grant in all things this his motion to enlarge time to file Record Excerpts in this case and that the same be enlarged to and including 9 November 04, the day on which the Record Excerpts were in fact filed with the clerk of this court. Appellant requests other relief to which he is entitled. Appellant requests justice.

Respectfully submitted,

“s/ _____”
RICHARD A. SHERLOCK, Appellant, Pro se
6409 Gillen Street- Metairie, Louisiana 70003
(504) 887-2961

CERTIFICATE OF CONFERENCE

I hereby certify that I have placed a telephone call to the office of Ellen Page Delsole, the Appellate Briefing Attorney assigned to this case, in Washington DC at 202-514-8128 and as result of that was told she would not consent to this appellant's Motion to Enlarge Time but would not file any written opposition.

“s/ _____”
RICHARD A. SHERLOCK

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing: **MOTION TO ENLARGE TIME WITHIN WHICH APPELLANT'S RECORD EXCERPTS MAY BE TIMELY FILED** has on this the 16th day of November, 2004, been mailed to all counsel of record in this action including the following parties at their respective address as indicated: Ellen Page Delsole, Appellate Section, 601 D Street NW, Room 7909 - P.O. Box 502, Washington, DC 20044.

"s/ _____"
RICHARD A. SHERLOCK

**United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK**

CHARLES R. FULBRUGE III
TEL. 504-310-7700
CLERK
600 Camp Street
NEW ORLEANS, LA 70130
New Orleans, LA 70130

November 16, 2004
Mr Richard A Sherlock
6409 Gillen Street
Metairie, LA 70003

No. 04-30163 USA v. Sherlock
USDC No. 94-CV-1867-K

We received your motion for enlargement of time to file record excerpts. In light of this motion being unnecessary, we are taking no action on this motion. If your motion to reinstate is granted, your record excerpts will be filed as of that date.

Sincerely,

CHARLES R. FULBRUGE III, Clerk
By: "s/ _____"
Kim Folse, Deputy Clerk
504-310-7712
cc: Ms Ellen Page DelSole
BR-9

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK
TEL. 504-310-7700
600 CAMP STREET
NEW ORLEANS, LA 70130

October 13, 2004

Mr Richard A Sherlock
6409 Gillen Street
Metairie, LA 70003

No. 04-30163 USA v. Sherlock
USDC No. 94-CV-1867-K

Your brief is filed. Opposing counsel's briefing time
continues to run.

You need to provide the following within 10 days:

We have not received 4 copies of the Record Excerpts
required by 5TH CIR. R. 30.

Sincerely,
CHARLES R. ULBRUGE III, Clerk

By: "s/ _____"
Jerome Anderson, Deputy Clerk
504-310-7693

cc: Ms Ellen Page DelSole
BR-5



05-481 JUN 8 - 2005

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2005

NUMBER _____

RICHARD A. SHERLOCK

Petitioner

VS.

UNITED STATES OF AMERICA

Respondent

SUPPLEMENTAL APPENDIX TO
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Richard A. Sherlock
6409 Gillen Street
Metairie, Louisiana 70003
(504) 887-2961

APPENDIX

Appendix AA	Motion and Order For Entry of Sale Filed 8-29-03
Appendix BB	Minute Entry of Judge Duval Filed 12-16-03
Appendix CC	Minute Entry of Judge Duval Filed 12-16-03

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
RICHARD ARTHUR SHERLOCK, et al.,)
)
Defendants.)

Civil No. 94-1867-K5
Sec. K, Mag. 5

MOTION FOR ENTRY OF ORDERS OF SALE

The plaintiff, United States of America, moves this Court to enter orders of sale in this civil action pursuant to the Court's final Judgment entered on September 26, 1997, t which granted judgment in favor of the United States foreclosing federal tax liens that encumbered the real property of the defendant, Richard A. Sherlock, located at 6409 Gillen Street, Metairie, Louisiana, and more particularly described as follows:

A CERTAIN PIECE OR PORTION OF GROUND, together with all the buildings and improvements thereon and all rights, ways, privileges, servitudes, appurtenances and advantages thereunto

The United States Court of Appeals for the Fifth Circuit affirmed this Court's Judgment on December 18, 1997.

Fee _____
Process _____
Dktd _____
CtRmDep _____
Doc.No. _____

Date of Entry
AUG 29 2003

applying, or in anywise appertaining, situated in the Parish of Jefferson, State of Louisiana, in BISSONET PLAZA SUBDIVISION, Section 9-F, being a part of Elmwood Lafreniere Plantation, in Square No. 2, bounded by Gillen Street, Elmwood Parkway, the rear property line alongside a 50 foot servitude in favor of 4th. Jefferson Drainage District bordering the Elmwood Canal, the rear property line alongside a 25 foot right of way bordering Canal No. 2 the southerly boundary of Section 9-F, and Apollo Drive, designated as Lot No. 44, all in accordance with the survey of Adloe Orr, Jr. & Association, C. E., dated November 18, 1963, which said lot commences at a distance of 349 feet from the corner of Gillen Street and Elmwood Parkway, and measured thence 71 feet front on Gillen Street, the same in width in the rear, by a depth along the side line nearer to Elmwood Parkway of 101.94 feet, by a depth along the opposite side line of 101.80 feet. Improvements thereon bear No. 6409 Gillen Street.

Being the same property acquired by John M. Cunningham from Mr. & Mrs. Robert Shipp, Jr., by act before Claude J. Champagne, Notary Public dated December 29, 1964, Jefferson Parish, Louisiana.

In addition, the Court entered judgment in favor of the United States

foreclosing federal tax liens that encumbered the personal property of the

defendant, Richard A. Sherlock, described as follows:

A lease in relation to a fishing camp located on a portion of the right of way or land belonging to Lake Catherine Land Company, Inc., on Old Spanish Trail Highway at Lake Catherine, Orleans Parish, Louisiana, being located and more described more particularly as follows:

A parcel of land, designated as Lot 88P, measuring 50 feet by 428 feet opposite Highway survey stations 361.00 and 361.50.

Proposed orders of sale, one for each of the properties described above, accompany this Motion. A copy of the fishing camp lease is attached to the relevant proposed order of sale.

JIM LETTEN
United States Attorney

Laura M. Conner
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 14198
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 514-6438
Facsimile: (202) 514-9868

or

555 4th Street, N.W., Room 6106
Washington, D.C. 20001

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Motion for Entry of Orders of Sale, including proposed orders of sale, have been served upon the following by depositing copies in the United States mail, first class postage prepaid, this 21st day of August, 2003:

Richard A. Sherlock
6409 Gillen Street
Metairie, Louisiana 70003

Dan A. Smertherman, Esquire
214 Chartres Street, Suite 6
New Orleans, Louisiana 70190

Charles E. McHale, Jr., Esquire
601 Poydras Street, Suite 2345
New Orleans, Louisiana 70130

Laura M. Conner
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 14198
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 514-6438
Facsimile: (202) 514-9868

or

555 4th Street, N.W., Room 6106
Washington, D.C. 20001

UNITED STATES DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

v.

RICHARD A. SHERLOCK, et al.,

Defendants.

Case No. 94-1867-K5
See. K, Mag. 5

ORDER OF SALE

A final judgment was entered by this Court in the above-entitled action on February 26, 1997, ordering that the plaintiff's federal tax liens be foreclosed and that the subject personal property, more particularly described below, be sold pursuant to 28 U.S.C. §§ 2001 and 2004:

A lease in relation to a fishing camp located on a portion of the right of way or land belonging to Lake Catherine Land Company, Inc., on Old Spanish Trail Highway at Lake Catherine, Orleans Parish, Louisiana, being located and more described more particularly as follows:

A parcel of land, designated as Lot 88P, measuring 50 feet by 428 feet opposite Highway survey stations 361.00 and 361.50.

A copy of the subject lease is attached to this Order of Sale.

Accordingly, it is hereby ORDERED as follows:

1. The United States Marshal for the Eastern District of Louisiana, or such representative as he may appoint or employ, is authorized and directed under 28 U.S.C. §§ 2001 and 2004 to offer for public sale and to sell the subject property.

2. The terms and conditions of the sales are as follows:

a. the sale of the property shall be free and clear of the interest of Richard Arthur Sherlock, or other claims of any party to this proceeding;

b. the sale shall be subject to building lines, if established, all laws, ordinances, and governmental regulations (including building and zoning ordinance) affecting the property, and easements and restrictions of record, if any;

c. the sale shall be held at the courthouse in Jefferson Parish, Louisiana, the city in which the property is deemed located;

d. the date and time for sale to be announced by the United States Marshal;

e. notice of the sale shall be published once a week for at least four consecutive weeks, before the sale in at least one newspaper regularly issued and of general circulation in the Parish, and, at the

discretion of the Marshal, by any other notice the Marshal deems appropriate. The notice shall contain a description of the property and shall contain the terms and conditions of sale in this order of sale;

f. there is no minimum bid;

g. the successful bidder shall be required to deposit with the Marshal at the time of the sale a minimum of ten percent (10 %) of the bid, with the deposit to be made by certified or cashier's check payable to the United States District Court for the Eastern District of Louisiana. Before being permitted to bid at the sale, bidders shall display to the Marshal or his representatives proof that they are able to comply with this requirement. No bids will be received from any person(s) who have not presented proof that, if they are the successful bidders, they can make the deposit required by this order of sale;

h. the balance of the purchase price for the Property is to be paid to the clerk of this Court within six days after the date the bid is accepted, by a certified or cashier's check payable to the United States District Court for the Eastern District of Louisiana. If the bidder fails to fulfill this requirement, the deposit shall be forfeited and shall be applied to cover the expenses of the sale, including commissions due under 28 U.S.C. § 1921(c), any amount remaining

to be applied to the income tax liabilities of Richard Arthur Sherlock. The property shall be again offered for sale under the terms and conditions of this order of sale. The United States may bid as credit against its judgment without tender of cash;

i. the sale of the property shall be subject to confirmation by this Court. On confirmation of the sale and receipt of the full purchase price of the sale, the Marshal shall execute and deliver an assignment of the lease to the purchaser. On confirmation of the sale, all interest, liens against, or claims to, the property that are held or asserted by all parties to this action are discharged and extinguished. The Marshal shall make return of the confirmation of sale for the property, with this proceeding endorsed thereon, showing the manner in which this has been executed the same, within sixty days from the date of the sale of the property;

j. the sale is ordered pursuant to 28 U.S.C. §§ 2001 and 2004, made without right of redemption.

3. Until the property is sold, the defendant Richard A. Sherlock is ordered to take all reasonable steps necessary to preserve the property in its current condition. He shall neither do anything that tends to reduce the value or marketability of the property nor cause or permit anyone else to do so. He shall not record any instruments, publish any notice, or take any other action

(such as running newspaper advertisements or posting signs) that may directly or indirectly tend to adversely affect the value of the property or that may tend to deter or discourage potential bidders from participating in the public auction, nor shall he cause or permit anyone else to do so.

4. After confirmation of the sale of the subject property, the Marshal shall ascertain the expenses of the sale and shall pay those amounts out of the sale proceeds. The Marshal shall then remit the balance of the sale proceeds to the Clerk of the Court with a statement of the amount of the net proceeds received from the sale.

5. Upon the sale of the subject property, the respective liens and claims of the parties shall attach to the proceeds of sale in the same order of priority as the liens attached to the subject property.

6. Within thirty days after the Clerk gives notice to the parties that she has received the funds from the Marshal, each party claiming an interest in the proceeds shall certify to the Court and to every other party the amount of its claim.

7. The proceeds of the sale will thereafter be distributed from the registry of the Court as follows and in accordance with a separate order of the Court:

To the United States of America to satisfy the Judgment, plus accrued additions and interest, entered by the Court in the above-named action on September 26, 1997.

Any balance remaining after that payment shall be held by the Clerk until further order of the Court.

8. If the amount due the plaintiff exceeds the amount distributed to the plaintiff, then the United States shall be entitled to a deficiency judgment against the defendant Richard A. Sherlock in the amount of its claim that remains due and owing.

IT IS FURTHER ORDERED that the Clerk shall immediately mail a copy of this order to all counsel of record herein, and shall deliver a copy to the United States Marshal.

ORDERED, this 28th day of _____, 2003.

STANWOOD R. DUVAL, JR.
UNITED STATES DISTRICT COURT

MINUTE ENTRY
DUVAL, J.
December 12, 2003

BB

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA

CIVIL ACTION

VERSUS

NO. 94.1867

RICHARD A. SHERLOCK, ET AL.

SECTION "K"(5)

Before the Court is a Motion to Compel Compliance with Subpoenas
al Issue, and Motion for Rule 60(b) Reconsideration of the Court's Order of
December 16, 2003 and Motion For Stay of Proceedings Pending
Disposition of the Motions Before this Court and Richard A. Sherlock's
Response to the Harsh Rhetoric of This Court in its Order of 16 Dec 03.
Having reviewed the motion, the Court finds it again without basis in law.
Accordingly,

IT IS ORDERED that the Motion to Compel Compliance with
Subpoenas-at Issue, and Motion for Rule 60(b).Reconsideration of the
Court's Order of December 16, 2003 and Motion for Stay of Proceedings
Pending Disposition of the Motions-Before this Court and Richard A
Sherlock's Response to the Harsh Rhetoric of This Court in its Order or 16
Dec 03is **DENIED**.

DATE OF ENTRY
JAN 26 2004

___ Fee ___
___ Process ___
___ Dktd ___
___ CtRmDep ___
___ Doc.No. ___

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA

CC

2003 DEC 16 AM 9:25
LORETTA G. WHYTE
CLERK

MINUTE ENTRY
DUVAL, J.
December 12, 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA

CIVIL ACTION

VERSUS

NO. 94-1867

RICHARD A. SHERLOCK, ET AL.

SECTION "K"(5)

Before the Court is "Richard A. Sherlock's Rule 60b (sic) Motion to Vacate and/or Modify Judgment and Motion for Reconsideration of the Plaintiffs Motion for Entry of Orders of Sale and Motion to Stay Order of Sale." Having reviewed the pleadings, memoranda and the relevant law, the Court finds no merit in the motion.

A final judgment was rendered in this tax matter brought by the United States on September 26, 1996. The Court found, inter alia, that Richard A. Sherlock was liable for federal income taxes in the amount of

DATE OF ENTRY
DEC 16 2003

Fee _____
Process _____
Dkt'd _____
CtRmDep _____
Doc.No. _____

436,061.81, plus statutory additions. In addition, the judgment in favor of the United States foreclosed federal tax liens that encumbered the real property of the defendant Richard A. Sherlock located at 6409 Gillen Street, Metairie, Louisiana and on a lease to a fishing camp located on Lake Catherine. *United States v. Sherlock*, 1996 WL 551474 (E.D. La. September 26, 1996). The judgment was affirmed by the United States Court of Appeals on December 18, 1997, *United States v. Sherlock*, 134 F.3d 369 (5th Cir. 1997). Certiorari was denied by the Supreme Court of the United States on October 19, 1998. *Sherlock v. United States*, 525 U.S. 949 (1998).

Pursuant to that judgment, on August 22, 2003, the United States moved for and on August 29, 2003, the Court ordered the sale of these interests. On September 22, 2003, the instant motion was filed by Sherlock. In this motion, Sherlock claims that (1) the Order of Sale violated the post discharge injunction pursuant to 11 U.S.C. § 524; (2) that the Internal Revenue Service liens were without jurisdictional foundation and that the Internal Revenue Service lacks jurisdiction and standing to maintain an action in collection against Sherlock; and (3) that the United States Department of Justice attorney lacks standing to make such a the motion. This motion is devoid of any basis in law or logic and verges on a sanctionable action by Sherlock.

Sherlock's argument that tax liens are discharged in bankruptcy is blatantly unfounded. Because Sherlock failed to file federal income tax returns for the years 1975 through 1984, those liabilities are excepted from any discharge under 11 U.S.C. §523(a)(1)(B)(I). In addition, discharge does not apply to any tax debts that a debtor willfully attempts to evade defeat. 11 U.S.C. §523(a)(1)(C). Considering the finding of this Court that the transfer of these properties was done to hinder, delay or defraud the United States in its attempt to collect his unpaid income tax liabilities, any general discharge that was granted to the defendant in his bankruptcy proceeding does not affect the personal judgment entered against him in this civil action and does not invalidate the orders of sale that this Court has enter. In addition, to the extent that such personal liability might have been discharged, the tax liens against these properties survive. 11 U.S.C. § 524(a)(1),(2). "Ordinarily, liens and other secured interest survive bankruptcy." *Internal Revenue Service v. Orr (In re Orr)*, 180 F.3d 656, 660 (5th Cir.1999) (citations omitted). Thus, the sale of the property against which valid tax liens had attached is not precluded and indeed is valid.

As to the rest of plaintiffs' claims concerning the authority of the Internal Revenue Service to enforce the internal revenue laws, the authority of the Assistant United States Attorney to bring this suit and to the extent that there is an implication that this Court is without authority to rule on

such motions, such allegations are frivolous and as stated by the United States Court of Appeals in *Crain v. Commissioner of Internal Revenue*, 737 F.2d 1417, 1417-18 (5 th Cir. 1984):

We perceive no need to refute these arguments with somber reasoning and copious citation of precedent; to do so might suggest that these arguments have some colorable merit. The constitutionality of our income tax system-including the role played within that system by the Internal Revenue Service and the Tax Court-has long been established.

Id. Arguments based on rank speculation about taking of oaths is ludicrous and will not be given truck.

Mr. Sherlock has led the United States government on a merry chase for more than ten years with regards to income taxes for the years 1975 through 1984. It is time for frivolous appeals and blatant evasion to end. Accordingly,

IT IS ORDERED that Richard A. Sherlock's Rule 60b (sic) Motion to Vacate and/or Modify Judgment and Motion for Reconsideration of the Plaintiffs Motion for Entry of Orders of Sale and Motion to Stay Order of Sale is **DENIED**.

